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Kevin Todd Butler

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Printz v. United States: Tenth Amendment Limitations on Federal Access to the Mechanisms of State Government

In Printz v. United States, the Supreme Court addressed the Tenth Amendment's protection of state sovereignty, a significant issue in the contemporary debate on the nature of United States federalism. Striking a key provision of the Brady Handgun Violence Prevention Act ("Brady Act") as unconstitutional, the Court expanded Tenth Amendment limitations on the federal government's access to the mechanisms of state government. The Court decision implicated issues bearing on the commerce power and the power of Congress to enlist state compliance with federal policy objectives.

I. FACTUAL BACKGROUND

Under the commerce power, Congress passed the Brady Act in 1993 as a response to an "epidemic of gun violence" afflicting the nation. Passed as an amendment to the Gun Control Act of 1968, the Brady Act sought to undermine the transfer of firearms to certain persons enumerated by the Gun Control Act. The class includes persons who are under the age of twenty-one, persons who do not reside in the dealer's state, and persons who are otherwise prohibited by state and local law from purchasing or possessing firearms. Sections 922(d) and (g) include a number of other persons in the class as well.

5. 117 S. Ct. at 2368-69.
6. Id. at 2368.
7. Id. Other proscribed persons include: convicted felons, fugitives from justice, unlawful users of controlled substances, persons adjudicated as mentally defective or committed to mental institutions, aliens unlawfully present in the United States, persons dishonorably discharged from the Armed Forces, persons who have renounced their citizenship, and

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To prevent the transfer of firearms to prohibited individuals, the Brady Act mandates the establishment of a national system for checking the backgrounds of prospective handgun purchasers. The Brady Act requires the Attorney General to have a permanent federal system in place by November 30, 1998. As an interim measure, the Brady Act immediately enlists the service of local chief law enforcement officers ("CLEOs").

Firearm dealers are required to obtain a prospective handgun purchaser's name, address, birth date, and sworn statement that the prospective purchaser is legally eligible to purchase a firearm under sections 922(b), (d), and (g). The firearm dealer must then provide that information to the CLEO. Section 922(s)(2) obliges the CLEO to use the information to "make a reasonable effort to ascertain within 5 business days whether receipt or possession [of a handgun by the prospective purchaser] would be in violation of the law." State law would then impose a duty on CLEOs to prevent prohibited firearm transfers.

The petitioners, CLEOs from counties in Montana and Arizona, objected to section 922(s)(2) and to subsequent provisions that required them either to destroy records in their possession relating to a handgun transfer that was deemed legal or to inform prospective purchasers upon request and in writing why the transfer was denied. They argued that the Brady Act unconstitutionally forced them, as state officers, into federal service by compelling them to execute a federal program. In Printz v. United States, the United States District Court for the District of Montana permanently enjoined the United States from enforcing section 922(s)(2), declaring it unconstitutional and void. Likewise, in Mack v. United States, the United States District Court

persons who have been subjected to certain restraining orders or been convicted of a misdemeanor offense involving domestic violence.

Id.

8. Id.
9. Id.
10. Id. at 2368-69.
11. Id. at 2369.
12. Id. (quoting 18 U.S.C. § 922(s)(2) (1994)).
13. Id.
14. Id.
15. Id.
16. Id. at 2369-70.
18. Id. at 1519-20.
for the District of Arizona declared section 922(s)(2) unconstitutional and permanently enjoined its enforcement.\textsuperscript{20}

The Arizona and Montana cases were consolidated, and in \textit{Mack v. United States},\textsuperscript{21} the Court of Appeals for the Ninth Circuit vacated the district courts' permanent injunctions enjoining the enforcement of section 922(s)(2) and reversed the district court rulings holding the section unconstitutional.\textsuperscript{22} In \textit{Printz}, the Supreme Court reversed the Ninth Circuit.\textsuperscript{23} The Court held those federal directives unconstitutional that require either the officers of the states or the officers of the political subdivisions of the states to administer or enforce federal regulatory programs.\textsuperscript{24}

\section*{II. \textsc{legal background}}

\textit{Printz} is the latest development in a line of Supreme Court cases that arguably begins with then Justice Rehnquist's dissent in \textit{Fry v. United States}.\textsuperscript{25} In \textit{Fry} the Court affirmed an injunction preventing Ohio from giving certain state employees a pay raise of 10.6%.\textsuperscript{26} The Economic Stabilization Act of 1970\textsuperscript{27} allowed the President to regulate salaries and wages, and the Pay Board formed under the Act had limited wage and salary increases to 5.5%.\textsuperscript{28} Petitioners in \textit{Fry} argued that the Act violated the Tenth Amendment because it interfered with sovereign state functions.\textsuperscript{29} Continuing a line of decisions that had been expanding the scope of the commerce power since the New Deal, the majority disagreed, holding that there was no Tenth Amendment violation in congressional regulation of state-employed workers' pay.\textsuperscript{30}

\begin{itemize}
\item \textsuperscript{20} Id. at 1383-84.
\item \textsuperscript{21} 66 F.3d 1025 (9th Cir. 1995).
\item \textsuperscript{22} Id. at 1034.
\item \textsuperscript{23} 117 S. Ct. at 2384.
\item \textsuperscript{24} Id.
\item \textsuperscript{25} 421 U.S. 542, 549 (1975) (Rehnquist, J., dissenting). Given the nature of United States federalism, an earlier starting point can always be suggested. See discussion infra Part IV. But because he was as yet a new voice on the Court in 1975 and because he survives to see the latter twentieth century Court's position on the federal nature of the United States, using Justice Rehnquist's dissent in \textit{Fry} as a starting point well illustrates federalism's movement away from the mid-twentieth century centralization processes—associated with the New Deal, World War II, the Great Society, and the Cold War—that were at their height when Justice Rehnquist joined the Court.
\item \textsuperscript{26} 421 U.S. at 548.
\item \textsuperscript{28} 421 U.S. at 543-44.
\item \textsuperscript{29} Id. at 547.
\item \textsuperscript{30} Id. at 548.
\end{itemize}
Justice Rehnquist's primary concern in his dissent was the lack of a state "constitutional counterweight" to Congress's use of the commerce power to regulate internal state matters. Justice Rehnquist's dissent in Fry can be read as a demand for boundaries that would clearly delineate state and federal power, boundaries that would be "constitutionally unassailable and presumably safeguarded from federal intrusion." As a solution to the apparent imbalance in the division of power between the federal government and the states, Justice Rehnquist argued that the line between federal and state power should be drawn where federal legislative action interfered with a state's exercise of its traditional governmental functions.

Writing for a bare majority in National League of Cities v. Usery, Justice Rehnquist constitutionalized his dissent in Fry. In National League of Cities, the Court held that while Congress could touch many different activities through its commerce power, even many wholly intrastate activities, Congress was nevertheless obliged to recognize the different footing upon which the states stand as opposed to the footing of private commerce, which Congress could otherwise regulate through the commerce power. The New Deal era witnessed a tremendous expansion of Congress's power under the Commerce Clause, but the Court curtailed this expansion in National League of Cities by preventing Congress from extending the national minimum wage standard to state employees.

The Tenth Amendment, the Court noted in Fry, was aimed at protecting the ability of the states "to function effectively in a federal system." In National League of Cities, the Court explained that the effective functioning of a state within the federal system is dependent upon the state retaining control over its own sovereignty and that the Constitution thus requires Congress to refrain from interfering with the traditional functions of the states. The Court held that the provisions of the Fair Labor Standards Amendments of 1974, which applied the

31. Id. at 552 (Rehnquist, J., dissenting).
33. 421 U.S. at 558 n.2.
34. 426 U.S. 833 (1976).
35. Id. at 854.
36. Id. at 851-52.
37. Id. (quoting Fry, 421 U.S. at 547 n.7).
38. Id. at 844-45.
national minimum wage standard to the wages of a number of state workers, crossed the federal-state boundary, upsetting the balance of power between the two.\(^{40}\) The Court also noted in dictum that just as the commerce power does not allow Congress to transgress the Sixth Amendment right to trial by jury or the Fifth Amendment right to due process, the commerce power does not allow Congress to violate the sovereignty reserved to the states by the Tenth Amendment.\(^{41}\)

In \textit{Hodel v. Virginia Surface Mining & Reclamation Ass'n},\(^{42}\) the Court again addressed allegations of federal encroachment on state sovereignty when it considered the Surface Mining Control and Reclamation Act ("Surface Mining Act").\(^{43}\) In order to alleviate the social and environmental problems caused by surface mining, the Surface Mining Act provided for an initial interim phase of federal regulation in which states were allowed to participate and for a permanent secondary phase under which states were given the option of regulating nonfederal lands within their borders subject to the approval of the Secretary of the Interior.\(^{44}\) Otherwise, the Department of the Interior would promulgate and enforce a regulatory program for the state.\(^{45}\) In an attempt to clarify the concept of a traditional governmental function, the Court in \textit{Hodel} outlined a three-part test for commerce power challenges.\(^{46}\) The Court stated that a successful challenge would show that the challenged statute regulated the "States as States,"\(^{47}\) that the challenged statute was directed at indisputable ""attribute[s] of state sovereignty,"\(^{48}\) and that state compliance with the statute would "directly impair [its] ability to structure integral operation in areas of traditional governmental functions."\(^{49}\) The challenge to the Surface Mining Act failed on the first element of the test because it did not regulate the states at all; it regulated the mining industry.\(^{50}\) And insofar as the Surface Mining Act touched the states, it did not regulate them but invited them to participate in "cooperative federalism."\(^{51}\)

\begin{itemize}
\item \(^{40}\) \textit{See} 426 U.S. at 852.
\item \(^{41}\) \textit{Id.} at 841-43.
\item \(^{42}\) 452 U.S. 264 (1981).
\item \(^{43}\) \textit{Id.} at 288. The Surface Mining Control and Reclamation Act is codified at 30 U.S.C. §§ 1201-1328 (1994).
\item \(^{44}\) 452 U.S. at 268-72.
\item \(^{45}\) \textit{Id.} at 270-72.
\item \(^{46}\) \textit{Id.} at 287-88.
\item \(^{47}\) \textit{Id.} at 287 (quoting \textit{National League of Cities}, 426 U.S. at 854).
\item \(^{48}\) \textit{Id.} at 288 (quoting \textit{National League of Cities}, 426 U.S. at 845).
\item \(^{49}\) \textit{Id.} (quoting \textit{National League of Cities}, 426 U.S. at 852).
\item \(^{50}\) \textit{Id.} at 289.
\item \(^{51}\) \textit{Id.}
In *FERC v. Mississippi*, the majority named cooperative federalism as an element of its rationale for upholding the Public Utilities Regulatory Policies Act ("PURPA") of 1978 against charges of a Tenth Amendment violation. Under PURPA, state energy regulatory authorities were required to adopt policies consistent with congressional desire to encourage the development of alternative sources of energy. The Court held it would be constitutionally acceptable for a state's failure to act in accord with federal policy to result in federal preemption of the state's authority to regulate energy utilities. In her dissenting opinion, Justice O'Connor said that she believed PURPA fell far short of the cooperative federalism that the Court identified in *Hodel*. Justice O'Connor's dissent in *FERC* illustrated the *Hodel* test's insufficiency as a jurisprudential tool for identifying traditional state functions. She asserted that the Court's rationale for its decision had the effect of giving the states an absurd choice. Regarding utility regulation as a traditional state function, Justice O'Connor saw Congress requiring the states to either comply with federal regulatory policy or refrain from performing a traditional state function altogether. She stated that because PURPA gave the states no real choice, PURPA had the effect of conscripting state legislatures into federal service. The great evil that Justice O'Connor saw in federal conscription of state legislatures—the "blur[ring] [of] the lines of political accountability"—would be addressed in the Court's next significant federalism decision.

Three years after the Court handed down its decision in *FERC*, it decided *Garcia v. San Antonio Metropolitan Transit Authority*, which addressed the problem of identifying traditional governmental functions that *FERC* had left conspicuously unresolved. Writing for the Court, Justice Blackmun rejected "as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is

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52. 456 U.S. 742 (1982).
54. 456 U.S. at 767.
55. Id. at 750-51.
56. Id. at 764-65.
57. Id. at 783 (O'Connor, J., concurring in part, dissenting in part) (citing 452 U.S. at 289).
58. Id. at 781.
59. Id. at 781 n.7.
60. Id. at 779.
61. Id. at 787.
"integral" or 'traditional.'\textsuperscript{63} The Court expressly overruled \textit{National League of Cities}\textsuperscript{64} and identified the constitutionally prescribed means of protecting state sovereignty in the democratic processes that sustain the structures of the federal government.\textsuperscript{65} It is perhaps best to understand this as a constitutionalization of the corollary to Chief Justice Marshall's rationale in \textit{McCulloch v. Maryland}.	extsuperscript{66} More than a century before \textit{Garcia}, the Court held that the Maryland state government could not impose its policy on the United States because the Maryland government was not answerable to the people of the United States whom Maryland presumed to tax by taxing the United States Bank.\textsuperscript{67} The government of the United States, on the other hand, is answerable to the people of Maryland and likewise to the people of all states of the union.\textsuperscript{68} Questions regarding the imposition of federal policy on the states are thus ultimately political in nature, and the sovereignty of the individual states is ultimately secured by the political activity of citizens acting in their alternative roles as citizens of the United States and as citizens of the various states.\textsuperscript{69} Arguably, \textit{Garcia} gave federal power the most generous rein ever accorded it by the Court, but the generosity of the \textit{Garcia} rule would prove short-lived.

Addressing provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 ("Radioactive Waste Act")\textsuperscript{70} in \textit{New York v. United States},\textsuperscript{71} the Court handed down a decision that played off the structural role of the states enunciated in \textit{Garcia} but that constituted a distinctive shift in the Court's attitude toward the exercise of federal power. Writing for the Court, Justice O'Connor labeled as "most severe" a provision that required states to take title to low-level radioactive wastes and to become liable for those wastes generated within their borders if they had not provided for their disposal in accord with federal directives by 1996.\textsuperscript{72} Consistent with her dissent in \textit{FERC}, Justice O'Connor viewed the choice given state energy commissions in the "take title" provision of the Radioactive Waste Act as meaningless.\textsuperscript{73} The Court identified the constitutional problem with the Radioactive Waste

\begin{enumerate}
\item Id. at 546-47.
\item Id. at 557.
\item Id. at 550.
\item 17 U.S. (4 Wheat.) 316 (1824).
\item Id. at 436.
\item Id.
\item \textit{Garcia}, 469 U.S. at 550-51.
\item 505 U.S. 144, 149-52 (1992).
\item Id. at 183-54.
\item Id. at 177.
\end{enumerate}
Act as an absence of congressional accountability in a process that effectively amounted to congressional commandeering of the state legislative process. Rather than taking responsibility for its own policy, Congress used the Radioactive Waste Act to hide federal policy behind requirements that the states enact legislation. Following the Court’s re-interpretation of the Garcia rule in New York, Congress would have to be directly exposed to the political repercussions of its policies. It may thus be appropriate to understand the New York rule as a version of the Garcia rule, but with teeth in that it prohibits congressional utilization of state legislative processes to achieve federal policy goals. Thus where Garcia gave free rein to congressional exercise of federal power, New York put real limits on the exercise of such power.

This review of the legal background of Printz indicates an ongoing shift that has taken place in the Supreme Court’s interpretation of the nature of United States federalism over the last thirty years. Centralization of power in the federal government became the standard during the New Deal era and continued well into the latter years of the twentieth century, but as early as Justice Rehnquist’s dissent in Fry, there was a voice on the Court stirring it to recognize the Tenth Amendment’s protection of state sovereignty. After struggling to conceptualize Tenth Amendment protection of state sovereignty, the Court resorted to a political test that had been implied in the federalist debate since Chief Justice Marshall headed the Court more than a century ago. Then after the Cold War ended with the collapse of the Soviet Union in 1991, the Court took a position in New York that was decidedly adverse to the trend of centralization that had dominated the Court’s thinking about federalism for most of the twentieth century, and it is at this point in history that the Court handed down its decision in Printz.

III. THE COURT’S RATIONALE

Justice Scalia wrote the opinion for five members of the Court, identifying the question before the Court as the constitutionality of “congressional action compelling state officers to execute federal laws.” Justice Scalia addressed three interpretive sources of constitutional meaning to frame the answer: early congressional legislative practice, constitutional structure, and judicial precedent.

74. Id.
75. Id.
76. Id.
77. 117 S. Ct. at 2369-70.
78. Id. at 2370.
The Court first considered whether the early Congress contemplated federal legislation that imposed federal duties on state officers. Responding to the dissent's argument that the early Congress assumed the power to utilize state governmental machinery as a matter of course, Justice Scalia replied that early federal legislation "appear[ed] to rest on the natural assumption that the States would consent to allowing their officials to assist the Federal Government." In other words, rather than a constitutionally based power to access the mechanisms of state government, the Court interpreted the Constitution as requiring any federal access to state governmental machinery to be contingent upon state consent to such access. Justice Scalia stated that the early Congress imposed nonconsensual duties only on state judicial officers, whom the Supremacy Clause obliged to adjudicate federal law.

The second phase of the Court's decision dealt with the federal constitutional structure, which the Court identified as incontestably one of dual sovereignty. The Court decided that the system of dual sovereignty depends upon both levels of separation of power created by the Constitution: the division of power between the federal government and the state governments and the division of power between the legislative and the executive branches of the federal government. Concluding that the Brady Act violated the separation of power provisions at both levels, the Court held that Congress had unconstitutionally circumvented the separation of power between itself and the President by transferring the power to execute federal law to CLEOs. Furthermore, the Court held that the Brady Act jeopardized dual sovereignty by threatening to upset the division of power between federal and state governments. The Court explained that "[t]he power of the Federal Government would be augmented immeasurably if it were able to impress into its service—and at no cost to itself—the police officers of the 50 states."

In considering whether Congress had the power to enact the provisions of the Brady Act in question, the Court also addressed the scope of the Necessary and Proper Clause of the United States Constitution.

79. Id. at 2370-72.
80. Id. at 2372.
81. Id. at 2371.
82. Id. at 2376 (citing Gregory v. Ashcroft, 501 U.S. 452, 457 (1991)).
83. Id. at 2377-78.
84. Id. at 2378.
85. Id.
86. Id.
87. Id.
Justice Scalia underscored Justice Rehnquist's dictum in *National League of Cities*, in which the Court stated that just as the commerce power does not allow Congress to transgress the Fifth and Sixth Amendment rights of individuals, the commerce power does not allow Congress to violate the sovereignty reserved to the states by the Tenth Amendment. Justice Scalia allowed that the Necessary and Proper Clause empowers Congress to enact such legislation as is necessary and proper to effectuate its limited legislative powers, but he reasoned that because Congress is not empowered to violate the sovereignty of states, congressional legislative acts that violate the Tenth Amendment, as did the Brady Act, cannot be necessary and proper.

In the third phase of its argument, the Court reviewed its own precedent and dramatically expanded its holding in *New York v. United States*. Arguing for the constitutionality of the Brady Act in *Printz*, the United States tried to distinguish the provisions of section 922(s)(2) from those of the Radioactive Waste Act of 1985. The United States took the position that while the Radioactive Waste Act required the state legislatures to make policy that the federal legislature had predetermined, the Brady Act imposed no policy-making requirements. Rather, the Brady Act "issue[d] a final directive to state CLEOs."

The Government urged that it is constitutionally acceptable to require state CLEOs to perform non-policy-making, federally imposed duties because Congress crosses the constitutional line "only when [it] compels the States to make law in their sovereign capacity."

The Court disagreed. Policy-making decisions, Justice Scalia stated, are implicit in the role CLEOs are required to play in the implementation of the Brady Act. For example, the Brady Act implicitly obliges CLEOs to determine the amount of departmental resources they will divert toward fulfillment of their duties under the Act, and decisions regarding the allocation of funds are necessarily policy-oriented. The Brady Act also directs CLEOs to make "reasonable" efforts to determine whether proposed firearm transactions were legal thus requiring CLEOs

89. 117 S. Ct. at 2379.
90. *Id.* Justice Scalia's argument has what might be considered a tautological structure. See *id.*
91. *Id.* at 2380.
92. *Id.*
93. *Id.*
95. *Id.* at 2380-81.
96. *Id.* at 2381.
to determine what amount of effort would be reasonable.\textsuperscript{97} Justice Scalia asked, "Is this decision ... not preeminently a matter of policy?"\textsuperscript{98}

Furthermore, the Court stated, the decisions of policy foisted upon state CLEOs by the Brady Act entail fiscal and political burdens for the states.\textsuperscript{99} The financial burden for making the reasonable efforts necessary to determine the legitimacy of prospective firearm transfers would be borne by the states.\textsuperscript{100} And the CLEOs, many of whom are locally elected officials, would face the potential political burdens associated with the erroneous prevention of a handgun transfer.\textsuperscript{101}

Justices Souter, Ginsburg, and Breyer joined Justice Stevens in dissenting.\textsuperscript{102} Justice Stevens stated that the commerce power and the Necessary and Proper Clause gave Congress "ample authority" to pass the Brady Act.\textsuperscript{103} In support of this position, the dissent stood in direct opposition to Justice Rehnquist's dictum on the Tenth Amendment. The dissent stressed that while the First Amendment prohibits certain categories of laws, the Tenth Amendment "imposes no restriction on the exercise of delegated powers."\textsuperscript{104}

Justice Souter also wrote a separate dissent in which he engaged Justice Scalia's interpretation of a passage from \textit{The Federalist} No. 27.\textsuperscript{105} In the passage, Hamilton wrote:

\begin{quote}
[T]he legislatures, courts, and magistrates, of the respective members[,] [i.e., the states,] will be incorporated into the operations of the national government as far as [the national government's] just and constitutional authority extends, and [the legislatures, courts, and magistrates of the respective members] will be rendered auxiliary to the enforcement of [the national government's] laws.\textsuperscript{106}
\end{quote}

Justice Scalia understood Hamilton to mean no more than that state governments have a duty to refrain from creating obstructions to, and interfering with, federal law's proper operation.\textsuperscript{107} Justice Souter, on
the other hand, found this same passage determinative of his position in favor of the constitutionality of the Brady Act.\textsuperscript{108}

IV. IMPLICATIONS

Harry N. Schieber opens his article \textit{Federalism}\textsuperscript{109} with a discussion of Woodrow Wilson's belief that each successive generation of Americans must reconsider the question of federalism, the question regarding the relationship between the federal and state governments.\textsuperscript{110} The debate in \textit{Printz v. United States} between Justices Scalia and Souter over the proper interpretation of \textit{The Federalist} No. 27\textsuperscript{111} points out that the question of federalism was not settled at the Constitutional Convention.\textsuperscript{112} Justice Scalia points to scholarship suggesting that even Publius was of a divided mind on the question.\textsuperscript{113} And as Justice O'Connor stated in \textit{New York v. United States}, federalism is "perhaps our oldest question of constitutional law."\textsuperscript{114}

As early as \textit{McCulloch v. Maryland}, Chief Justice John Marshall predicted that "the question respecting the extent of the [federal government's] powers . . . is perpetually arising, and will probably continue to arise, so long as our system shall exist."\textsuperscript{115} Chief Justice Marshall's opinion in \textit{McCulloch}, which limited state exercise of sovereignty over the people of the United States to whom the governments of individual states are not politically answerable,\textsuperscript{116} rests ultimately upon a fundamental tenet of federalism. This tenet is that the United States is not a compact between the states; it is rather a coequal sovereign with the states.\textsuperscript{117}

After the ascendancy of the Federalist party in the early government of the United States, the presidency of Andrew Jackson initiated an era that gave voice to the proponents of states' rights, an era that ended

\textsuperscript{108} Id. at 2402 (Souter, J., dissenting).
\textsuperscript{109} Harry N. Schieber, \textit{Federalism, in THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES} 278-87 (Kermit L. Hall ed., 1992) [hereinafter OXFORD COMPANION].
\textsuperscript{110} Id. at 278.
\textsuperscript{111} \textit{THE FEDERALIST} No. 27, at 174-77 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
\textsuperscript{112} 117 S. Ct. at 2375 n.9.
\textsuperscript{113} Id. (citing D. BRAVEMAN ET. AL., \textit{CONSTITUTIONAL LAW: STRUCTURE AND RIGHTS IN OUR FEDERAL SYSTEM} 196-99 (3d ed. 1996)).
\textsuperscript{114} 505 U.S. at 149.
\textsuperscript{115} 17 U.S. at 405.
\textsuperscript{116} Id. at 436.
\textsuperscript{117} Id. at 402-05.
with the catastrophe of the Civil War. In contrast to the Jacksonian mood of the mid-nineteenth century, in United States v. Darby, decided during the New Deal era of the mid-twentieth century, the Court expanded congressional power to regulate commerce, holding that this authority was "attended by the same incidents which attend the exercise of [the States'] police power[s]." The court in Darby expressly overruled earlier cases, and propounded the position that the Tenth Amendment "states but a truism that all is retained which has not been surrendered."

Stating that the Tenth Amendment "is not without significance," the Court began to give ground on this dictum in Fry. Seizing upon the "not without significance" statement in National League of Cities, Justice Rehnquist initiated a progression in the federalism debate that has, at present, culminated in Printz. While Printz may seem to approach an interpretation of United States federalism more consistent with that of the Jacksonian era, it is probably not the case that the federalism debate presently stands anywhere near its pre-Civil War position. Barring catastrophic events comparable to the Civil War, Justice Thomas's dissent to U.S. Term Limits, Inc. v. Thornton, in which he suggests that United States federalism should be understood as a compact between the states, is most likely inapplicable to the structural realities and possibilities of the contemporary United States. Nevertheless, should the decision in Printz prove resilient, congressional power to act under the commerce power is now significantly limited, and Congress will have to find other means to enlist state compliance with federal objectives. The spending power is perhaps the most ready means. In accordance with South Dakota v. Dole, Congress may condition state receipt of federal funds on compliance with federal policy objectives.

119. 312 U.S. 100 (1941).
120. Id. at 114.
121. Id. at 116 (overruling Hammer v. Dagenhart, 247 U.S. 251 (1918) (preventing Congress from using commerce power to address problem of child labor)).
122. Id. at 123-24.
123. 421 U.S. at 547 n.7.
124. 426 U.S. at 842-43 (quoting Fry, 421 U.S. at 547 n.7).
125. 514 U.S. 779, 846 (1995) (Thomas, J., dissenting). Justice Thomas wrote in his dissent: "The ultimate source of the Constitution's authority is the consent of the people of each individual State, not the consent of the undifferentiated people of the Nation as a whole." Id. at 846.
127. Id. at 206-07.
Congress may also elect to forgo state participation in certain areas of regulation. For example, the Court in *FERC* stated that Congress could have totally pre-empted state regulation of utilities.\(^\text{128}\) Likewise, in *Hodel* the Court stated that Congress could have pre-empted the field of surface mining regulation by denying the states any role whatsoever in the regulation of surface mining.\(^\text{129}\) Ironically, forcing Congress to take this approach works against any ostensible policy objective favoring the enhancement of state power within the federal system. The dissent to *Printz* recognizes this, pointing out that "[i]n the name of States rights, the majority would have the Federal Government create vast national bureaucracies to implement its policies."\(^\text{130}\)

If indeed the results of this decision ultimately run contrary to the decentralization of the power that the federal government has acquired over the course of the twentieth century and if the results of the decision run contrary to the investiture of power in more local polities as the dissent expects, *Printz* could come to be regarded as a decision adverse to any meaningful contribution to the federalism debate that a theory of states' rights might make. But as Chief Justice Marshall pointed out, the United States federalism debate is quintessentially perennial. *Printz* is but the latest installment, and not the final chapter, in the nation's ongoing consideration of its federalist nature.

KEVIN TODD BUTLER

\(^{128}\) 466 U.S. at 764-65.  
\(^{129}\) 462 U.S. at 290-91.  
\(^{130}\) 117 S. Ct. at 2396 (Stevens, J., dissenting).